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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/700,863	11/21/2000	Philip Edwin Howse	A0-1269	2839

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EXAMINER
SMITH, KIMBERLY S

ART UNIT	PAPER NUMBER
3644	

DATE MAILED: 08/12/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)	
	09/700,863	HOWSE, PHILIP EDWIN	
	Examiner	Art Unit	
	Kimberly S Smith	3644	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *28 July 2003* .

2a)☒ This action is **FINAL**. 2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1,3,4,6-23,25,26,28-46,50,51,53 and 56* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1,3,4,6-23,25,26,28-46,50,51,53 and 56* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

11)☐ The proposed drawing correction filed on _____ is: a)☐ approved b)☐ disapproved by the Examiner.

If approved, corrected drawings are required in reply to this Office action.

12)☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

13)☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☒ All b)☐ Some * c)☐ None of:

1.☒ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____ .

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

14)☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).

a) ☐ The translation of the foreign language provisional application has been received.

15)☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

1) ☐ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) _____ .
4) ☐ Interview Summary (PTO-413) Paper No(s). _____ .
5) ☐ Notice of Informal Patent Application (PTO-152)
6) ☐ Other: .

DETAILED ACTION

Response to Arguments

1. As with the Applicant's response, passages cited from the Howse publication will be made in reference to the column and lines at which the passages are found in the Howse patent.

2. Applicant's arguments filed 07/28/03 have been fully considered but they are not persuasive. Regarding the applicant's statement that "the Howse publication is limited to particles that are electrostatically charged during deposition on the surface". This is not found persuasive. Reference is made to column 4 lines 8-13 in which Howse has disclosed that "Charging of the particles may be achieved by friction." and that "frictional charging of the particles in the case of traps may take place...during operation". As such, Howse discloses that a frictional charge may be applied to the particles during operation, not only prior to operation as stated by the applicant.

3. Regarding the applicant's request for support in the rejection of the Howse' particles being sufficiently fine for them to become airborne: reference is drawn first to column 3, line 59 in which Howse has stated that the particles may be dispensed in and/or dispersed via a gaseous carrier. This citation provides an initial representation that the particles are sufficiently fine to become airborne, as they are capable of being dispersed in a gaseous carrier. Reference is further drawn to column 7, lines 66 thru column 8, line 1 in which Howse clearly states that "Aphids become rapidly contaminated....by having powder blown over them." As such, Howse clearly discloses that the particles are sufficiently small for the particles to become airborne.

4. Given reference the paragraphs above, it is therefore considered that Howse in fact provides suggestion and thereby a reasonable expectation for success to use powders that are so

fine as to become airborne when a flying insect passes and that the electrostatic charge may be applied during operation, not only prior to operation. The rejection to the claims stand.

Claim Rejections - 35 USC § 102

5. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

> A person shall be entitled to a patent unless –
>
> (b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

6. Claims 23, 25, 26, 28-35, 42 and 44 are rejected under 35 U.S.C. 102(b) as being clearly anticipated by International Patent Publication WO 94/00980 to Howse.

In reference to claim 23, Howse ('980) discloses a pest control apparatus including a surface in a region of which a pest is capable of being lured (page 12, lines 17-19) and which bears a particulate material incorporating a killing or behavior-modifying agent (page 12, lines 21-23; page 16, lines 24-29), the particulate material being sufficiently fine as to become electrostatically charged (page 5, line lines 28-31) when rendered airborne by movement of the pest in the region of the surface (page 8, lines 14-20, where it is understood that particles that can be charged by friction would accordingly be charged by the friction they encounter while being rendered airborne).

In reference to claim 25, Howse discloses a powder combined with at least one biological, synthetic or natural pesticide as a killing agent (page 16, lines 24-25).

In reference to claim 26, Howse discloses an insect pest (page 1, lines 7-8).

In reference to claim 28, Howse discloses a particulate material chargeable by friction (page 8, lines 14-15).

In reference to claim 29, Howse discloses a surface associated with a trap comprising an electrically insulating material (page 10, lines 31-35, where the plastic is electrically insulating).

In reference to claim 30, Howse discloses a plastics material (page 10, lines 31-35).

In reference to claim 31, Howse discloses a pheromone or parapheromone attractant (claim 25).

In reference to claim 32, Howse discloses a surface coated with an electrostatically charged fine powder (claims 30, 33, and 46).

In reference to claim 33, Howse discloses a powder that retains its electrostatic charge while on the trap surface (page 12, lines 21-23).

In reference to claims 34 and 35, Howse discloses an apparatus wherein undesired removal or loss of the particulate material is eliminated or reduced by raised edges at the periphery of the surface (figure 1A, where raised edge 7 prevents loss of particulate material).

In reference to claim 42, Howse discloses a tubular trap (figure 1A).

In reference to claim 44, Howse discloses a surface comprising an interior surface of the trap (figure 1B, surface 21).

Claim Rejections - 35 USC § 103

7. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person

having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

8. Claims 1, 3, 4, 6-13, 20, and 22 are rejected under 35 U.S.C. 103(a) as being unpatentable over Howse publication WO 94/00980 in view of admitted prior art (referred to herein as "Admission").

In reference to claim 1, Howse discloses a method of coating a pest with a particulate material incorporating a killing or behavior-modifying agent, the method comprising the step of drawing a pest sufficiently close to a surface bearing the particulate material (page 12, lines 17-23). Howse discloses that this particulate material can become electrostatically charged by friction during operation and by being dispensed into the air (page 8, lines 14-24), and it is therefore understood that the friction of movement in the air can charge the particles, but Howse does not specifically discuss that movement of a pest in the region of the surface renders the particulate material airborne.

Admission teaches that it is well known in the art that a flying insect provides downward momentum to the air around it and can generate vortices on the downward strokes of their wings (Specification, page 14, lines 10-18). This teaching therefore demonstrates that the movement of an insect's wings is naturally accompanied by movement of the air around the insect. Since Howse discloses that flying insects are drawn into the region of a fine particulate matter, and since Admission teaches that it is well-known that flying insects provide momentum to the air around them, it is considered inherent in the method disclosed by Howse that the fine particles in the Howse trap would be rendered airborne when a flying insect was drawn close to the surface with the particulate material. This is a naturally occurring phenomenon. As discussed above,

Howse teaches that friction imparts a charge to the particles, and it is therefore understood that movement of the particles into the air would provide them with a charge.

In reference to claims 3, 4, 6-13, 20, and 22, Howse ('980) discloses the claimed invention. See discussion of claims 24-26, 28-35, 42, and 44, respectively.

9. Claims 14-19, 21, 36-41, and 43 are rejected under 35 U.S.C. 103(a) as being unpatentable over Howse ('980) in view of U.S. Patent No. 5,685,109 to Rimback.

In reference to claims 14-19 and 36-41, Howse does not disclose the claimed recess accommodating the particulate material.

Rimback discloses a recess (figures 3-4, element 66) defined in a surface on a plate which is preformed and stands alone (plate 62), the recess comprising a trough (cup 66) and being provided with raised edges (element 64), and the recess accommodating an insect bait material (column 3, lines 37-42). Rimback teaches that the recess allows one insect bait material to be kept separate from a liquid bait material, thereby allowing for the provision of multiple materials for baiting and trapping insects (column 3, lines 37-42). Therefore, it would have been obvious to one having ordinary skill in the art to accommodate the particulate material disclosed by Howse in a recess as taught by Rimback, so that multiple insect trapping or killing materials can be used throughout different regions of the apparatus. Rimback does not disclose that the recess is smaller than the pests being controlled, but it would have been obvious to design a recess smaller than the pests being controlled, since a change in size of a component is recognized as being within the level of ordinary skill in the art.

In reference to claims 21 and 43, Howse does not disclose a triangular trap.

Rimback teaches that a trap design including a triangular cross-section (figure 1) allows for inexpensive assembly from a single piece of plastic material (column 2, lines 4-5) and forms an enclosed volume for trapping and holding insects (column 1, lines 44-45). Therefore, it would have been obvious to one having ordinary skill in the art at the time the invention was made to use a triangular shape, as taught by Rimback, for the trap disclosed by Howse, to facilitate assembly and to trap and hold insects.

10. Claims 45, 46, 48, and 50 are rejected under 35 U.S.C. 103(a) as being unpatentable over Howse in view of Rimback.

In reference to claims 45, 46, 48, and 50, Howse, as modified in view of Rimback, discloses the claimed invention. See discussion of claims 23, 28, 32, 36, 37, and 41 above.

11. Claims 51-56 are rejected under 35 U.S.C. 103(a) as being unpatentable over Howse in view of admitted prior art (Admission) and Rimback.

In reference to claims 51-56, Howse, as modified in view of Admission and Rimback, discloses the claimed method of preventing dispersion of a particulate material from a pest trap. See discussion of claims 1, 2, 10, and 12-14 above.

Double Patenting

12. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970);and, *In re Thorington,* 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground

provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

13. Claims 23 and 44 are rejected under the judicially created doctrine of double patenting over claim 1 of U. S. Patent No. 6,041,543 to Howse since the claims, if allowed, would improperly extend the "right to exclude" already granted in the patent.

The subject matter claimed in the instant application is fully disclosed in the patent and is covered by the patent since the patent and the application are claiming common subject matter. Note that Howse has disclosed that the particles are of a sufficiently small size as to become airborne and that the particles are capable of becoming charged by friction during use. on is not a positive limitation but only requires the ability to so perform. It does not constitute a limitation in any patentable sense. Therefore, the patentable limitations of claims 23 and 44 are disclosed in claim 1 of patent '543 to Howse.

Likewise, claim 25 is rejected under the judicially created doctrine of double patenting over claims 1 and 11 of patent '543 to Howse, and claim 31 is rejected over claims 1 and 8-10 of patent '543 to Howse.

Furthermore, there is no apparent reason why applicant was prevented from presenting claims corresponding to those of the instant application during prosecution of the application which matured into a patent. See *In re Schneller*, 397 F.2d 350, 158 USPQ 210 (CCPA 1968). See also MPEP § 804.

14. Claims 1, 4, 6, 10, 11, and 22 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claim 21 of U.S. Patent No.

6,041,543 to Howse in view of Admission. See teachings of Admission as discussed in reference to claims 1, 4, 6, 10, 11, and 22 above.

15. Claim 3 is rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 21 and 22 of U.S. Patent No. 6,041,543 to Howse in view of Admission.

16. Claim 9 is rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 12, 19, and 20 of U.S. Patent No. 6,041,543 to Howse in view of Admission.

17. Claims 14-19 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claim 21 of U.S. Patent No. 6,041,543 to Howse in view of Rimback. See teachings of Rimback as discussed in reference to claims 14-19 above.

18. Claims 28-30, 32-35, and 42 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claim 1 of U.S. Patent No. 6,041,543 to Howse in view of Howse WO 94/00980. See teachings of Howse ('980) above.

19. Claims 36-41, 43, 45, 46, and 50 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claim 1 of U.S. Patent No. 6,041,543 to Howse in view of Rimback. See teachings of Rimback above.

Conclusion

20. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Kimberly S Smith whose telephone number is 703-308-8515. The examiner can normally be reached on Monday thru Friday 10:00-4:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Charles T Jordan can be reached on 703-306-4159. The fax phone numbers for the organization where this application or proceeding is assigned are 703-872-9326 for regular communications and 703-872-9327 for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 703-306-5771.

kss
August 4, 2003

Charles T. Jordan
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